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WHY THE SENTENCING DISCRETION MUST BE MAINTAINED

Margaret McMurdo [1] φ

There is undoubtedly a public perception, to some extent media fed, that the sentences imposed on offenders by the judiciary are too light and often inconsistent; 82 per cent of people polled by the Courier-Mail newspaper on 17 March 1994 believed that sentences imposed were too light;[2] yet public studies show that lay people, when asked to impose sentences on the same facts and mitigating circumstances placed before judges, imposed more lenient sentences than those imposed by the court.[3] Queensland jails are bursting at the seams with admissions increasing 117 per cent from 1988 to 1998.[4] The building of new prisons has become a grim growth industry, leaving education, health, police and the justice system to battle for the left-over budgetary dollar with resulting social problems including more crime.

The *Criminal Offence Victims Act* 1995 declares that a victim of crime should be accorded fair and dignified treatment, have access to the justice system and the prosecutor should inform the court of the harm caused to a victim.[5] The effect of the crime on the victim is a matter which the court must consider in sentencing.[6]

Some victims will always feel that the sentence imposed was too lenient but that does not necessarily follow. The difficult task for sentencing judges is to impose a sentence which is fair, both to the victim, the offender and the public and within the established sentencing

range.[7]

The uninformed find superficial easy solutions such as mandatory sentencing an attractive answer to a complex problem. Mandatory sentences currently apply in Queensland only to the offences of murder[8] and piracy and attempted piracy.[9] Mandatory life sentences were imposed for a range of drug offences under the *Drugs Misuse Act* 1986 until amended in 1990.[10] More recently, Part 9A of the *Penalties and Sentences Act* 1992 has limited the sentencing discretion in respect of designated serious violent offenders where the sentence imposed is 10 years or more.[11]

Limits on the sentencing discretion have been imposed in other Australian jurisdictions. In New South Wales, mandatory life sentencing applies for murder and for trafficking in heroin or cocaine. In Victoria, since 1993[12] defined recidivist "serious sexual offenders" and "serious violent offenders" may not have their sentences adjusted to take account of the abolition of remissions.[13] In Western Australia, an offender, whether an adult or a juvenile, convicted of a third home burglary must be sentenced to a minimum of 12 months imprisonment or detention.[14]

The harshest mandatory sentencing laws have been imposed in the Northern Territory where courts are compelled to impose minimum periods of imprisonment on persons convicted of designated property offences,[15] irrespective of the triviality of the offence or

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φ This paper is based on an article I wrote for the Queensland Bar News, No 3, December 1999.

the personal circumstance of the offender: 14 days imprisonment for a first offence, 90 days for a second and one year for a third.[16] Juvenile offenders are not exempted from this mandatory sentencing regime;[17] indeed a repeat property offender who is aged over 15 years must receive a minimum of 28 days detention. These laws have been much criticised and a recent amendment[18] now permits a court to refuse to impose a sentence of detention in "exceptional circumstances" but that amendment does not apply to juvenile offenders.

In the USA, mandatory sentencing has been flavour of the decade: for example the Florida legislature has recently made life sentences mandatory for repeat violent offenders against the elderly or children;[19] and offenders convicted of three violent felonies.[20] The *10-20-Life Bill* 1999 imposes a mandatory 10 year sentence if a gun was present during an offence; a 20 year sentence if a gun was used; and 25 years to life if someone was injured by the gun.

The initial appeal of mandatory sentencing neglects its manifold problems. The mandatory sentencing of young offenders is contrary to the widely accepted principle that juvenile offenders should be incarcerated only as a last resort. Senators Bolkus, Grieg and Brown have introduced the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999. Senator Brown argues the Bill is based on Australia's obligations under the United Nations Convention on the Rights of the Child to which Australia is a signatory.[21] The Bill has resulted in a Senate Inquiry into mandatory sentencing,[22] but it does not seem to have

government support.[23]

Senator Brown's concerns are shared by Louis Schetzer, Director of the National Children's and Youth Law Centre. He believes that mandatory sentencing legislation is in serious breach of the United Nations Convention on the Rights of the Child and that the detention and imprisonment of young children for trivial offences constitutes human rights abuses in Australia.[24]

Mandatory sentencing does not allow mitigation for a plea of guilty and demonstration of remorse. The criminal justice system gives generous discounts to those who plead guilty[25] especially in cases where genuine remorse is demonstrated at an early stage; the great bulk of work in the criminal courts is sentences.[26] Mandatory sentencing will result in fewer pleas of guilty and place increased time and resources pressure on the courts, the prosecution, police and legal aid, with a flow-on increased cost to the community.

Inevitably, mandatory sentencing will cause a substantial increase in the number of prisoners with ancillary increased costs to the community. The average annual cost of a prisoner in Queensland was $43,435 in 1996-97 (compared to the cost per offender serving a community based order at $4 per day). The recidivism rate for those on community based orders was comparable to that of prisoners.[27]

Mandatory sentencing will have its greatest impact on the disadvantaged and

dispossessed who are already over represented in the criminal justice system, especially the indigenous, the young, the uneducated, the unemployed and the mentally unstable, almost certainly increasing the shameful numbers of black deaths in custody.

There is evidence to support the claim that mandatory sentencing such as the US AThree Strikes≅ legislation results in a dramatic increase in violence against police, corrections officers and the public as offenders facing the prospect of a mandatory life sentence have nothing to lose and are more likely to resist arrest, kill witnesses or attempt a prison escape.[28]

There is some evidence that witnesses and jurors may not honestly take part in the criminal justice system if they think a verdict of guilty will result in an unfair mandatory sentence. A 70 year old San Francisco woman refused to testify against an addict burglar who had broken into her car. She didn't think he deserved a life sentence and called the Three Strikes law a "holocaust for the poor".[29] Louis Schetzer also claims that victims of propertyt offences are not reporting them because they do not want to see young people sent to prison for trivial offences. [30]

That leads to the most compelling and obvious argument against mandatory sentencing: it will inevitably lead to injustice. Lord Taylor CJ noted in respect of proposed mandatory sentencing in the UK:[31] "... the proposal subverts the function of the court which is to sentence according to the justice of each case."[32]

Senator Brown[33] quotes the following examples of injustices which have resulted from the Northern Territory legislation requiring mandatory sentencing:

- A 24 year old indigenous mother was sentenced to 14 days imprisonment for receiving a stolen $2.50 can of beer.
- A 27 year old teacher was angry about the quality of a hot dog at a Darwin fast food bar and poured water on the till; she had paid in full for the damage but had to be sentenced to 14 days imprisonment.
- An 18 year old indigenous youth obeyed his father and admitted to police that he stole a $2.50 cigarette lighter and was sentenced to 14 days imprisonment.
- A 29 year old homeless indigenous man wandered into a back yard when drunk and took a $15.00 towel; it was his third conviction for a property offence and he had to be imprisoned for one year.
- A 20 year old man with no prior convictions was sentenced to 14 days imprisonment for theft of petrol valued at $9.00.
- An 18 year old youth was sentenced to 90 days imprisonment for stealing 90 cents from a motor vehicle.
- Two 17 year old girls with no prior convictions were sentenced to 14 days imprisonment for the theft of clothes from other girls staying in the same room.
- A 17 year old girl with no prior convictions was sentenced to 14 days imprisonment for receiving jewelry stolen by other young people.

To those examples Louis Schetzer adds that of an 18 years old Aboriginal man from a

remote Aboriginal community who siphoned $9 worth of petrol into his car so he could drive his pregnant girlfriend the 200 kilometers to Alice Springs hospital to give birth; he was sentenced to a mandatory minimum of 14 days imprisonment; the magistrate voiced his frustration at having to impose that sentence.

David Pannick QC sees mandatory sentences as a public confidence trick by the legislature.[34]

> "Lord Windlesham[35] observes that they seek to reassure the population 'by making promises that the law can at best imperfectly and incompletely deliver'. Once the legislature has spoken, and the politicians have moved on to other vote winning slogans, the judges, the lawyers, and prison staff 'have to live with the consequences' of laws which add to, rather than help to remedy, the problems caused by offending behaviour. ... Lord Windlesham's informed and informative analysis justifies his conclusion that it must be 'for an independent judiciary, and not politicians dependent on public support to decide on the degree of punishment which a crime deserves.' "

Mandatory sentencing will lead to even more prisons. This is costly, not only in the short term for accommodation, food and security but also in the long term as prisons tend not to reform and rehabilitate but rather to expose inmates to hardened criminals, organised crime, physical and sexual abuse and drug taking. The North Australian Aboriginal Legal Aid Service claims that mandatory sentencing laws have increased the Northern Territory's Corrections budget by more than $8 million without reducing crime; in fact home burglaries have increased since the laws were introduced, even though the imprisonment rate in the Northern Territory is five times that of any other Australian State or Territory. [36]

There is no clear and convincing evidence that mandatory sentencing works as a deterrent to lower the crime rate.[37] The US Center on Crime, Communities and Culture=s Justice Policy Institute notes that:

> ADespite the political rhetoric surrounding three strikes laws nationally, they are having no impact on violent crime in the States where such laws have been enacted. In fact, States around the country which have not adopted three strikes laws experienced nearly three times the drop in violent crime of States which have adopted such laws.=[38]

The Institute=s study recommended the abolition of mandatory sentencing laws such as Three Strikes.

The Australian Institute of Criminology published its paper on mandatory sentencing in December 1999. It questions mandatory sentencing as a crime prevention strategy and notes that whilst mandatory sentencing delivers modest levels of crime prevention, it does so at a considerable cost. It cites a US study which estimates that every $1 milli/on spent on mandatory sentencing prevents 60 crimes, but if that money was spent on early prevention with young people at risk, an extra 100 crimes could be prevented. The paper concluded:

> "Mandatory sentencing claims to prevent crime, introduce certainty and consistency into a criminal justice system lacking in those qualities, and reflect community condemnation of crime. Available evidence suggests that mandatory sentencing can deliver modest, but expensive crime prevention. The large government investment required by mandatory sentencing laws would arguably return a much greater yield in terms of crime prevention if it were invested in prevention policy in areas such as education. Critics also argue that crime prevention by selective incapacitation is a difficult task laced with uncertainty and inconsistency which is done particularly poorly by legislation that imposes punishment automatically on the basis of prior

> offending. Moreover, they are that the policy of selective incapacitation is morally questionable, particularly as it routinely disadvantages the poor and marginalised. The deterrence-based assumptions of mandatory sentencing are also questionable. Mandatory sentencing does not deliver the consistency it promises. In short, critics of mandatory sentencing argue that it is a crude policy resting on crude assumptions about how crime is prevented, what the public want, and what legislation can deliver." [39]

Whether social reformer or economic rationalist, the inevitable conclusion is that money spent assisting disadvantaged families from an early stage is an effective early crime prevention strategy and preferable in every way to mandatory imprisonment of those babies and young children 17 years later. [40]

The challenge for the judiciary is to ensure the community understands why a particular sentence has been imposed; the courts, and where necessary the Court of Appeal, must ensure that sentencing is principled, proportionate and within the appropriate range, whilst still retaining flexibility for individual cases; [41] to communicate effectively with the public the courts need the assistance of a professional community liaison officer. [42] If the judiciary successfully meets this challenge, the public will recognise that mandatory sentencing with its resulting injustices and expense is unwarranted.

The challenge for our Queensland community is to realise that there are no magic wands or easy solutions to the crime problem; every action has a reaction and a cost. We need a genuinely motivated bi-partisan debate which focuses on the costs and benefits of early intervention strategies for those at risk and innovative sentencing options such as

rehabilitation centres for drug offenders and drink drivers and restorative justice programs, including the Re-Integration Shaming Experiment currently being undertaken in Canberra.[43] Expensive prison spaces should be reserved for those who must be incarcerated; maintaining the discretion of sentencing judges and magistrates with the protection of an appeal system is the best way of justly determining this complex issue of who to imprison and for how long.

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1. I acknowledge with thanks the research and editing assistance of my associate, Lisa Richardson.

2. Davies JA, in his paper "Do Current Sentencing Practices Work?" presented at the 13th South Pacific Judicial Conference in Apia, Samoa, on 28 June 1999.

3. de Jersey CJ, Opening Remarks, Launch of *Queensland Sentencing Manual*, 31 July 1998.

4. Criminal Justice Commission Quarterly Monitor, vol. 4, CJC, 1999.

5. Ss 5, 7 and 14.

6. *Penalties and Sentences Act* 1992, s 9(2)(c) and (e) and (4)(c) and *Juvenile Justice Act* 1992, s 109(1)(g).

7. See *Veen v R* (1987-1988) 164 CLR 465, 476, Mason CJ, Brennan (as he then was), Dawson and Toohey JJ. As to the difficult task of sentencing for judges, see *R v Taylor and Napatali* CA 157 and 158 of 1999, 20 August 1999, McPherson JA paras [26] and [27].

8. S 305, *Criminal Code*.

9. Ss 81 and 82, *Criminal Code*.

10. Ss 5, 6(a), 8 and 9. In 1990, the *Drugs Misuse Act* 1986 was amended by the *Drugs Misuse Act* 1990 to remove mandatory life sentences and provided for a review of sentences of mandatory life imposed under the earlier regime.

11. See *R v Collins* CA 238 of 1998, 18 September 1998; *Siganto v The Queen* (1998) 73 ALJR 162; *R v Van der Werff* CA 479 of 1998, 14 May 1999; *R v Robinson* CA 72 of 1998, 26 May 1998; *R v Booth* CA 338 of 1998, 30 March 1999; *R v Daphney* CA 328 of 1998, 16 March 1999 and *R v Nguyen* CA 151 of 1999, 9 July 1999 (the subject of a special leave application to the High Court); but as to the discretion to declare an offender convicted of a serious violent offence when the sentence imposed is between 5 and 10 years, see *R v Bojovic* (CA No 4 of 1999, 8 June 1999 and *R v McCartney* (CA No 13 of 1999, 22 June 1999).

12. *Sentencing (Amendment) Act* 1993 (Vic).

13. *Corrections (Remissions) Act* 1991 (Vic) was enacted to bring about Atruth in sentencing≅. Judges are otherwise required to consider the loss of remissions in ensuring an offender will not spend more time in prison than before the changed legislation; *Sentencing Act* 1991 (Vic), s 10.

14. *Criminal Code Amendment Act (No 2)* 1996.

15. Theft, irrespective of the value of the property, excluding theft where the offender was lawfully on the premises, unlawful use of a motor vehicle, caravan or trailer as a passenger or driver, receiving stolen goods, regardless of value, receiving after a change of ownership, and assault with intent to steal. A sentencing judge or magistrate cannot suspend any part of a mandatory sentence, impose a home detention order or fix a non parole period that expires before the mandatory sentence has been served: *Trennery v Bradley* (1997) 6 NTLR 175; 93 ACrimR 433 which confirmed the absence of any judicial discretion when sentencing in respect of offences where mandatory minimum sentences applied.

16. s 78A, *Sentencing Act* 1995 (NT)

17. s 53AE *Juvenile Justice Act* 1983 introduced by the *Juvenile Justice Amendment Act (No 2)* 1996, effective March 1997.

18. s 78A(6B) *Sentencing Act* 1995 (NT)

19. *Felony Re-Offenders Bill* 1997 (Florida).

20. *Three Strikes Bill* 1999 (Florida).

21. Signed 22 August 1990; Instrument of Ratification deposited for Australia 17 December 1990; Entry into force for Australia 16 January 1991 - UNTS 1588 p 530.

22. The Senate Legal and Constitutional References Committee invites interested organisations and individuals to lodge submissions by Friday, 29 October 1999 to the Secretary, Senate Legal & Constitutional References, Parliament House, Canberra, ACT 2600 or by e-mail to legcon.sen@aph.gov.au. The Committee is due to report on the first sitting day of 2000.

23 Interview with the Prime Minister on Perth radio 6PR 25 August 1999.

24 The World Today, ABC Radio, 24 August 1999.

25. *Penalties and Sentences Act* 1992, s 13

26. Approximately 75 per cent of matters in the Supreme and District Courts in 1998 were sentences.

27. Queensland Corrective Services Commission Annual Report 1997/8, 15. That report notes at p 14 that the overwhelming issue facing the QCSC was the rapid growth in prison numbers, the highest rate of growth in Australia. The adult imprisonment rate (number of prisoners per 100,000 population 17 years +) in Queensland has almost doubled from 89 in June 1993 (2061 prisoners) to 164 in December 1997 (4497 prisoners), an increase of 117 per cent since 30 June 1993. Davies JA (ibid) notes that to this cost must be added the continuing cost of building more prisons which in absolute terms is costing Australian taxpayers over $971 million with no apparent reduction in the crime rate.

28. Taifa, *Three Strikes and You're Out Mandatory Life Imprisonment for Third Time Felons* (1995) 20 (2) Univ Daytona L Rev 717; Henham, R, *Back to the Future on Sentencing: the 1996 White Paper* (1996) 59 The Modern Law Review 861 at 868.

29. Skolnick, in his *Reply to Delulio=s Instant Replay Three Strikes was the Right Call* at http://epn.org/prospect/18/18-cnt.html.

30 The World Today – ABC Radio – 24 August 1999.

31. Which subsequently came into force as the *Crimes (Sentences) Act* 1997 (UK).

32. Lord Taylor, HL Deb vol 572 col 1026, 24 May 1996. See also Henham, *Back to the Future on Sentencing: the 1996 White Paper* The Modern Law Review vol 59, 861-874. As to the desirability of maintaining the sentencing discretion see *Taylor v Napatali*, n 4, McMurdo P at [7].

33. *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999, Second Reading Speech, 25 August 1999.

34. Pannick, *Three Strikes and They're Wrong*, The Times, 25 February 1997, p 20.

35. Windlesham, *Responses to Crime: volume 3: Legislating with the Tide* Oxford University Press (1996)

36 The North Australian Aboriginal Legal Aid Service Report on Mandatory Sentencing, November 1999.

37. Senator Brown (Tas) Second Reading Speech, *Human Rights (Mandatory Sentencing Juvenile Offenders) Bill* 1999; Neil Morgan *Capturing Crims or Capturing Votes* Univ NSW Law Journal vol 22(1), 1999 p 267; *Information on Departmental Juvenile Justice Services in the NT*, NT Correctional Services Department 1991.

38. Justice Policy Institute March 6, 1997 A<Three Strikes= laws fail to reduce violent crime nationally on the third anniversary of California=s <three strikes= law= ≅, at http://www.cjc.org/jpi/3strikespr.html.

39 Australian Institute of Criminology No 138 Mandatory Sentencing – Declan Roche, 5-6.

40. See also Davies JA, n 1 at 14.

41. See *Crime, Justice and Protecting the Public* (London: HMSO 1990) Cm. 965

42. The New South Wales, Victorian, South Australian and Western Australian State courts and the Federal and Family Courts, the Australian Industrial Relations Commission, the Industrial Relations Court and Commission (SA) and the National Native Title Tribunal all have such an officer.

43. The Law Report, Radio National, 21 September 1999 - *Family Conferencing*.